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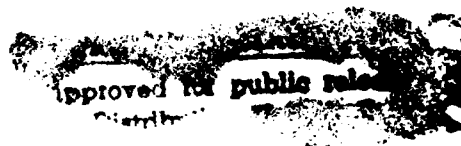
Mobilizing the Defense Contracting Process

Robert G. Morrison
Defense Logistics Agency

Faculty Research Advisor
Dr. Rita Wells



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The Industrial College of the Armed Forces
National Defense University
Fort McNair, Washington, D.C. 20319-6000

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ABSTRACT

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Author: Robert G. Morrison, Defense Logistics Agency

The objectives of the paper are to: (1) Assess the extent to which DoD acquisition laws and regulations provide the leeway necessary for acquisition professionals to accomplish their mission during a national emergency or mobilization; (2) Examine how well acquisition professionals employed the tools available to them during Operation Desert Shield/Storm; and, (3) Recommend appropriate legislative, regulatory, and policy changes to ensure that the appropriate priority is placed on the primary mission of troop support during a mobilization.

Over the years, the defense acquisition process has been used to promote an ever-increasing number of socioeconomic programs. To a certain extent, each of these programs detracts from the efficiency and effectiveness of performing the primary mission -- supporting the troops. During peacetime, the socioeconomic programs add to the cost and administrative burden of the defense acquisition process. During a mobilization, misplaced priorities in the contracting process can result in lost opportunities and lives on the battlefield.

Specific recommendations for legislative and regulatory changes are set forth in the framework of viewing contracting during mobilization as an element of logistics. Logistics, as Eccles noted, is the means of war. During a mobilization, all socioeconomic programs should take a back seat to the primary mission of supporting the troops.

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MOBILIZING THE DEFENSE CONTRACTING PROCESS

Congress is not shy about using the DoD acquisition process to promote interests other than "providing our military forces with the best equipment, when and where needed, at the lowest overall cost to the taxpayer." Most of the laws are intended to protect the taxpayers or to achieve broader social goals. An extensive network of regulations has been generated to implement the laws in spirit and intent, and to ensure that acquisitions reflect sound business judgment and are consistent with DoD policy.

To the extent that laws and regulations do not contribute directly to the primary mission of supporting the military services, they add a significant cost and administrative burden to the DoD acquisition process. It is best for acquisition officials to accept these burdens and to recognize that those entrusted by the Constitution with determining how to allocate the defense budget to reflect the national interests, have done so.

In peacetime, supplying the troops with quality goods and services in a timely manner, while complying with seemingly unrelated laws and regulations, presents DoD acquisition professionals with many unique, but tolerable, challenges. During times of national emergency, when the results of the acquisition process are reflected directly on the battlefield, delays incident to unrelated laws and regulations are not tolerable. They are not tolerable to acquisition professionals or to

their primary customers -- the soldiers, seamen, airmen, and marines who have been placed in harm's way. These delays should not be tolerable to any member of American society, even those intended to be the primary beneficiary of the law or regulation.

Fortunately, the drafters of most of the DoD acquisition laws and regulations have not lost sight of the primary mission of DoD --to fight the Nation's wars. Most laws and regulations contain waiver or exemption authorities, at some level within DoD, which are intended to help refocus priorities during a national emergency.

The objectives of this paper are to:

(1) Assess the extent to which DoD acquisition laws and regulations provide the leeway necessary for acquisition professionals to accomplish their primary mission during a national emergency;

(2) Examine the ability and willingness of DoD's acquisition professionals at every level, working within the laws and regulations, to refocus priorities during a recent national emergency situation, Operation Desert Shield/Storm (ODS); and,

(3) Recommend appropriate legislative, regulatory, and policy changes to ensure that during a national emergency, all of the ancillary interests imbedded in the defense acquisition process, take a back seat to the primary objective of supporting the troops.

Terminology

"Acquisition" has been used in some contexts to include a broad array of activities beginning with the drafting of requirements, and including every action along the way, stopping just short of the user of the product or service acquired. In this paper, only the "contracting" aspects of acquisition will be reviewed, i.e., actions taken by contracting personnel from the receipt of a funded requirement (purchase request) to the moment the government enters into a legally binding agreement (contract)¹ for the goods or services required.

"Mobilization" as used herein, refers to the process of directing resources toward resolution of a crisis or emergency situation. This use is more consistent with the concept of Graduated Mobilization Response² (GMR) than is the traditional use of "mobilization" to designate specific events or classes of actions³.

Scope

This paper will consider all Federal contracting actions necessary to support the "crisis management" and early "national emergency" stages of a mobilization⁴. Actions taken by DoD and civilian contracting offices in the Continental United States (CONUS) are within the scope of this review, as are contracting actions outside the United States, including those within the theater of operations.

This paper will not argue the peacetime merits of any of the intended

outcomes of the hundreds of laws which control the Federal acquisition process. Whether the intended outcome is integrity, equality, protection of disadvantaged groups, supporting treaties and trade agreements, protecting domestic industry, promoting a clean environment, or what appears to be pure "pork", the use of the defense budget to accomplish indirectly related goals of society is a fact of life DoD has operated under to an increasing extent over the years. If Congress decides to relieve DoD of all acquisition laws except those necessary to ensure that tax dollars were spent honestly and efficiently toward supporting the defense mission, it will constitute a greater surprise to many than did the fall of the Berlin Wall, or the collapse of the Soviet Union.

Why Focus on Contracting?

When viewed in the grand scheme of laws, regulations, capital equipment, personnel, training, production capacity, transportation, etc., necessary to mobilize, a discussion limited to contracting must be recognized as narrow, but critical. Clearly, even the most efficient, effective contracting process will not, standing alone, provide for an effective mobilization. It makes little sense to have the ability enter into contracts expeditiously if there are no providers of the goods and services required. Further, it would not be useful to contract for equipment that we did not have the capacity to transport to the theater of operations, or trained personnel available to use the equipment once it arrived. Likewise, the effectiveness of all other elements of mobilization are diminished, if the contracting process does not allow

us to take full advantage of our capability.

In developing a national strategy to meet future mobilization requirements, we face many difficult decisions:

How large should the military force be? What percentage of the force should be active duty, reserve, etc.? How should they be trained?

Where will we obtain the weapons and equipment to fight future wars? Should we stockpile equipment? Should we continue to prototype weapons systems without actually going into production? Should we rely on slow, uneconomical production rates to keep the production base warm? Should the government intervene in the marketplace to ensure that critical capabilities survive? Should we encourage arms exports to ease the burden of maintaining the industrial base?

How will we transport troops and equipment to the theater of operations? Should we build more cargo ships and transport planes? Should we subsidize U.S.-flag vessels and the air transport industry during peacetime to ensure their availability in support of mobilization?

It is highly unlikely that as a nation we will be willing to make the sacrifices necessary to meet every mobilization challenge on a moments' notice. The best we can hope for is that our leaders will choose a viable, affordable plan, that will fit into a well-reasoned

comprehensive Defense plan. And, that any political decision to engage in a military situation is consistent with our ability to mobilize and meet that challenge. Even with our best efforts, history tells us that we will get caught short in some element necessary to mobilize effectively⁵. To paraphrase a line from the movie "Body Heat" - "There are 50 ways to screw up a perfect mobilization plan. A genius can think of 35. We're not geniuses."⁶

The good thing about focusing on the contracting element of mobilization, is that significant opportunities are available for improvement, at a relatively low cost. If implemented properly, changes to the contracting process add nothing to the peacetime budget, and do not sacrifice peacetime socioeconomic objectives. If the contracting portion of the mobilization puzzle is "fixed," the burden will be lightened on the aspiring geniuses addressing the 49 less controllable elements of mobilization.

History

In the United States, contracting under a state of mobilization preceded contracting during peacetime. In fact, mobilization contracting preceded the birth of the Nation. In June 1775, when the Second Continental Congress took control of the Army and appointed a Commissary-General to acquire supplies,⁷ there was no time to pass hundreds of acquisition laws, and generate 30,000 pages of acquisition regulations.

Over the century and a half following the Revolutionary War, acquisition law grew slowly and sporadically. Some laws were enacted or adjusted during the Civil War and World War I to facilitate mobilization, other laws were passed after the wars as a result of lessons learned during the wars⁸. Occasionally, laws were passed during peacetime to ensure the integrity of the acquisition process and for various social causes⁹.

The Great Depression of the 1930's brought the first concentrated effort to use the Federal acquisition process to further social and economic goals (e.g., the Walsh-Healey Public Contracts Act; the Buy American Act; and, the Davis-Bacon Act). With the advent of World War II, the emphasis in legislating the Federal acquisition process shifted back to war fighting and mobilization concerns. In 1940 several laws were passed to facilitate expeditious production of defense equipment¹⁰. Eleven days after the Japanese attack on Pearl Harbor, the President signed the first War Powers Act and eliminated much of the administrative baggage that had been legislated into the Federal acquisition process. Nine days later, Executive Order 9001 rounded the edges off the War Powers Act and designated authorities necessary to implement it. In other words, within twenty days of the onset of war, the Government was able to enact enough emergency authority to support the greatest mobilization in the history of mankind.

One of the lessons learned from W.W.II was that the peacetime acquisition laws and regulations were not flexible enough to accommodate emergency situations. To remedy this situation, one

body of law was created to apply to all defense contracting under any circumstance¹¹. This law, the Armed Services Procurement Act of 1947, was implemented via the Armed Services Procurement Regulation (ASPR) in 1949. For civilian agency acquisitions, the Federal Property and Administrative Services Act of 1947, and the Federal Procurement Regulation (FPR) in 1959¹² served the same purpose.

The ASPR was significant because it provided DoD acquisition professionals and their leaders a mechanism to meet many mobilization challenges without resorting to legislation.

In 1976, the ASPR underwent a name change to the "Defense Acquisition Regulation" (DAR). In 1984, pursuant to Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405) the DAR and the FPR were combined into the Federal Acquisition Regulation (FAR). In DoD, the FAR is supplemented by the Defense FAR Supplement (DFARS), lower level Department and agency supplements, and supplements of those supplements (collectively referred to as the FAR System). For mobilization purposes, the FAR System at the outset of ODS (August 1990) provided acquisition professionals with essentially the same tools as the 1949 ASPR.

Since the end of W.W.II the DoD acquisition process has been encumbered by a seemingly endless succession of laws designed to use the Defense budget to achieve goals other than buying defense capability. In most cases, these laws are written to allow for waivers and exemptions during a national emergency.

Do acquisition laws and regulations impede or facilitate contracting during a mobilization?

The answer to both parts of this question can be "Yes." Every action that does not add value to the war effort can be an impediment to mobilization. This assertion can be extended to contracting actions not directly related to mobilization in CONUS contracting offices where efforts expended on non-emergency acquisitions detract from the resources available to support the mobilization. Laws and regulations are impediments even when they provide for exemptions or waivers, because resources are consumed and time is lost while the exemptions and waivers are processed. Of course the most significant impediments come from, (1) laws from which there is no exemption or waiver, or which require approval of the waiver or exemption at an unreasonably high level; and, (2) regulations which unnecessarily add requirements over and above the legal requirements.

While acquisition laws and regulations are usually considered to be impediments, they can also be viewed from the perspective that they facilitate a mobilization. In a 1983 report, prepared at the request of the Under Secretary of Defense for Policy, Richard Danzig¹³ stated, "...one cannot usefully speak of 'barriers' to mobilization. Instead, one ought to recognize that the law lays out roads that channel bureaucratic (and private) traffic moving over the unfamiliar terrain of a mobilization." Danzig's comment here referred generally to his findings after reviewing ten "substantive areas," including "Procurement" (i.e.,

"Contracting"). In the specific area of procurement, Danzig noted that the bulk of limitations did not flow from statute, but rather from the predecessors to the FAR, and from excessive centralization of approval authority¹⁴. Danzig stated that existing legislation typically permits necessary waivers and pointed out the significant emergency contracting authority available under Public Law 85-804¹⁵.

In 1987, the DoD Logistics Systems Analysis Office (LSAO) completed a very narrow study of acquisition policies specifically affecting Procurement Administrative Lead Time (PALT) during mobilization¹⁶. The study team offered 23 proposals for consideration by the Assistant Secretary of Defense for Logistics, and 11 proposals for action by DoD components. Nine of the recommendations were for statutory revision, others recommended FAR, DFARS, or other regulatory changes. All proposals were directed at the reduction of PALT (i.e., the amount of time necessary to turn a funded purchase request into a contract). While few of the legislative problems dealt with "show-stoppers," (i.e., laws for which there is no waiver or exemption authority short of another law or National Emergency declaration), the cumulative burden of laws on the acquisition process appears to be significant. There is no evidence that the proposals in the LSAO Study were ever collectively acted upon by OSD¹⁷. However, some impediments were subsequently overcome or minimized¹⁸, others have been added¹⁹.

In summary, you can view the overwhelming majority of acquisition laws and regulations as impediments, since they add no value to the primary mission of DoD during a mobilization. On the other hand, if you accept

socioeconomic and oversight legislation as a fact of life in the DoD acquisition process, then you must view the waivers and exemptions available during mobilization as facilitators.

Do DoD acquisition laws and regulations provide the leeway necessary for acquisition professionals to accomplish their primary mission during a mobilization?

There are few laws from which there is no relief short of new legislation. In most cases, there are alternatives to the peacetime acquisition process, which the contracting officer can employ to accomplish the mission during mobilization. In the event of a "traditional mobilization" or declared national emergency, extraordinary authorities such as the War Powers Act or the provisions of Public Law 85-804 can be invoked, or new laws will be enacted as in W.W.II.

However, the existence of work-around procedures and exemption authorities is of little value if the contracting officer is not aware of the authority, or if someone in the chain of command does not act in a way to allow the contracting officer to exploit the authorities. So, even if the acquisition laws and regulations are adequate, there is no guarantee that they will be employed optimally.

Mr. Danzig correctly pointed out that most of the contracting laws provide mobilization waiver or exemption authorities. He also correctly pointed out that centralized authority and over-regulation detracted from the ability of acquisition professionals to operate effectively

during a mobilization. But, even if acquisition regulations and the personnel take full advantage of the authorities available to them, there are still some laws from which there is no relief, and every law that adds no value to the mobilization effort represents a misplaced prioritization of scarce resources during the mobilization. Also, in a GMR environment, a great deal of contracting activity occurs before formal declarations of "National Emergency" or "War" rescue contracting personnel with the type of sweeping authority introduced at the beginning of W.W.II. Finally, the sheer volume of acquisition laws and regulation that add no value during a mobilization has continued to increase since 1983, and shows no sign of letting up. Mr. Danzig's assessment of the extent to which acquisition legislation is an impediment to the contracting process during mobilization was more accurate in 1983 than in 1993.

How effectively did acquisition professionals use the tools available to them to fight in ODS?

Performing effectively during a mobilization requires a reprioritization, i.e., sacrificing peacetime goals and objectives for wartime goals and objectives. Depending on the severity and duration of the conflict, every level of Government and citizenry can be intimately involved in a mobilization. For a mobilization such as the air strike on Libya in the early 1980s, participation was limited largely to a handful of military personnel and Executive Branch officials. During a declared war on the other hand, drastic measures such as commodity rationing, selective service, and internment of entire segments of the population

have been implemented. How much of a mobilization we are in is a matter that should be decided at the highest levels of Government. For domestic political reasons, or perhaps because of international coalition-building or power projection considerations, our leaders have been reluctant to use terms traditionally associated with a level of mobilization. There have been no declared wars since W.W.II, and only limited national emergency authority (not acquisition related) was invoked during ODS.

When there is no declared level of emergency or "condition," acquisition professionals are challenged to assign priorities on their own. Whether the decision is to enter into a letter contract, limit competition, waive a domestic content requirement, etc., individual decisions of contracting officers and their superiors play a large role in determining the extent of peacetime/wartime trade-offs we are willing to make as a Nation. In other words, **every time an acquisition official uses a waiver or exemption to dislodge peacetime policy in support of a mobilization effort, the scope of the mobilization effort is more precisely defined.**

During ODS there is evidence that, at the level of the contracting officer, the overwhelming policy decision was that since our troops had been committed to the battlefield, we were at war. Accordingly, contracting officers and supporting personnel at contracting activities called every tool available into play to support ODS requirements²⁰. To the extent contracting officers could trade-off peacetime policies and objectives to support mobilization objectives, they did. When the

contracting officers did not have the authority to reprioritize the accomplishment of conflicting National objectives, they requested support from the higher echelons of their organizations. This response is not surprising. At the level of the contracting officer, reprioritization means taking whatever action is necessary, on each individual contract or class of contracts, to increase the chances of fellow Americans to prevail in the emerging conflict.

Support at levels above the contracting officer was not as uniformly in favor of "pulling out all the stops" as were contracting officers. It is not atypical of a headquarters/field activity relationship to have disagreements over autonomy and oversight. From agency to agency, and sometimes between components within the same agency, there were significant differences in what officials were willing to waive or exempt²¹. Some agencies undertook comprehensive efforts at the outset of ODS to provide blanket ODS waivers where appropriate, and to lower review and approval levels. Other agencies were less forthcoming with the kind of help field activities needed to ease the burden of supporting ODS. Therefore, within the existing laws and regulations, the package of tools available to contracting officers in each contracting office varied. It is difficult to ascertain why there was such variation among approving authorities during ODS. It may have been that an honest evaluation of the circumstances lead reasonable people to different conclusions concerning the extent to which ODS requirements could be met without extraordinary procedures. Or, perhaps the difference was in a misplaced view of a headquarters as an overseer, when it should have been focusing on its role as a facilitator.

Whatever the reason, the result was that some headquarters activities retained more authority to reprioritize National objectives during the ODS mobilization than did others.

In addition to reviewing how acquisition officials used the tools available to them during ODS, it is appropriate to review any attempts to secure additional contracting tools during ODS, i.e., request for statutory relief. OSD, with the support of the Military Departments and the Defense Logistics Agency (DLA), compiled a list of acquisition laws that could be impediments to the efficient execution of ODS²². The list relied heavily on field input based on current ODS experience, and "laundry lists" of proposals generated in previous years, such as the LSAO study²³. The OSD legislative proposals were informally sent to Capitol Hill on 18 January 1991 (shortly after the Air War commenced)²⁴. No action was taken on the informal package, and OSD never submitted formal legislative proposals for ODS²⁵. In the way of legislation, the only new tool made available was an increase in the threshold for small purchases to \$100,000, but only for purchases outside the U.S. in support of ODS²⁶. This authority was "a great help and a significant timesaver" to the contracting officers located outside the U.S.²⁷

For some contracting offices, at least initially, there was a practical problem associated with the special waivers, exemptions and authorities available during ODS. That is, the rules for contracting during a mobilization are spread throughout the FAR System. There is no place where a contracting officer can find a summary of all the tools

available. The lack of such guidance was sighted as having created some problems during ODS²⁸.

ODS Lessons Learned

It is important to view lessons learned from any war with a recognition that the circumstances of the war were unique, and our ability to fight the next war may be tested within an entirely different set of parameters. Many significant aspects of ODS may distinguish it from all future wars and thereby skew our perception of how well prepared we are for future conflicts. Among the significant features from a contracting perspective were -- the amount of time prior to military engagement; the relatively short duration of the conflict; the ability and willingness of the Host Nation to provide significant support; and, the cooperation of contractors, whether due to patriotism, the popularity of the war, or the opportunity to secure additional defense contracts at the early stages of a general defense drawdown.

The significant contracting lessons from ODS are summarized as --

Legislative - Over the years acquisition law has digressed further and further from the fundamental mission of DoD. The digression has been caused by the addition of hundreds of laws that impact the DoD contracting process. To some extent, each law detracts from DoD's ability to function efficiently or effectively during a mobilization. There is a belief among some on Capitol Hill that the authority in existing law is sufficient to support a mobilization. "Empirical evidence" may be

requested to support legislative change²⁹. A significant overarching lesson to be learned from ODS was that no emergency "declaration" was invoked to provide sweeping relief from peacetime acquisition policies. Piecemeal legislation based on empirical evidence may require mission failure prior to receiving Congressional support. Easing the burden on contracting offices was not sufficient justification for legislative relief during ODS.

To better understand the legislative impediments encountered during ODS, the laws are categorized according to the severity of the impediment as follows:

Potential "Show-Stoppers" - As mentioned earlier there are relatively few laws in this category. These are laws which could result in the inability to award a contract without statutory relief or other unreasonable delays. Among the laws identified as problems during ODS were: provisions of the Small Business Act that required determinations of nonresponsibility³⁰ to be referred to the Small Business Administration for Certificates of Competency (CoCs), and that small business subcontracting plans be negotiated prior to the award of a contract³¹; the length of time and amount of expenditure allowed prior to definitization of an Undefined Contractual Action (UCA)³²; and, the requirement for compliance with Cost Accounting Standards³³. Laws in this category give acquisition professionals no leeway to reprioritize workload or resources when we convert from peacetime to mobilization.

The specific lesson learned during ODS was that no action is likely to be taken to remove these impediments unless DoD can demonstrate problems related directly to the legislation. Because the build-up time was so long, and the actual war was so short, it would have been difficult to demonstrate the adverse impact of any of these laws during the war. For example, the statutory requirement to definitize the first ODS UCAs within 180 days of receipt of a qualifying proposal was just beginning to detract from resources needed to enter new contracts when the war ended. The delays inherent in the CoC process will always be difficult to demonstrate because the contracting officer always has the unsavory alternative of accepting, without appeal, a CoC³⁴. The requirement for a negotiated small business subcontracting plan can be reached easily, if either party (especially the Government) is desperate to fill a wartime requirement.

Direct Administrative Burdens - Acquisition laws which allow for exemptions and waivers under certain conditions, at predetermined levels, are included in this category. These laws reflect the best efforts of lawmakers to recognize that whatever "other" goal was to be achieved when a particular law was introduced into the acquisition process, DoD needed flexibility under certain circumstances (e.g., public interest, public exigency, domestic nonavailability). Examples are the exceptions to the requirements for full and open competition³⁵, and the requirement to buy domestic end products³⁶. As mentioned earlier, acquisition professionals take on the role of policy makers as they use the flexibility provided in these laws to prioritize mobilization needs over peacetime objectives of each law.

Even though these laws relieve DoD of certain requirements during a mobilization, they must be viewed as administrative burdens, since determinations, justifications, waivers and exemptions must be prepared and approved at various levels. The extent to which these laws are a burden varies, depending on the level of approval required for deviation from the law, and whether blanket or class deviations are authorized.

During ODS, the extent to which contracting offices incurred these administrative burdens, to otherwise facilitate the mobilization effort, varied widely. However, even the contracting agencies which were liberal in granting ODS waivers and exemptions received requests for legislative relief from the associated administrative requirements³⁷. The most significant lesson to be learned from ODS concerning laws of this type is: There is an administrative cost associated with every exception from the normal way of doing business. Considered individually, the administrative burden may not appear to be onerous or unreasonable. Considered collectively, there is reason to challenge extent to which the waiver and exemption provisions allow contracting offices to respond to mobilization challenges.

Indirect Administrative Burdens - The rest of the acquisition laws fall into this category. This categorization is not meant to minimize the significance of these laws during peacetime, but rather to suggest that during a mobilization every law adds to burden of the contracting officer attempting to support the mobilization. The

burden has an impact on mobilization requirements as well as other requirements processed during a mobilization. The indirect burden can be created by the sheer volume of clauses required in each contract, or the volume of representations and certifications generated. Examples are the requirement to comply with the Walsh-Healey Public Contracts Act³⁸, and affirmative action requirements for the hiring of handicapped individuals³⁹ and veterans⁴⁰. Another form of administrative burden is the type that may not be directly related to a mobilization requirement, but detracts from the contracting officer's ability to satisfy mobilization requirements, by mandating action in another area. Examples are the Freedom of Information Act⁴¹, and numerous reporting requirements imposed on contracting offices.

The indirect nature of the burden imposed by this category of law does not lend itself identifying specific examples of problems that were created during ODS. The problem is a result of the cumulative impact of laws designed to impact the DoD acquisition process. The problem becomes more acute during a mobilization, when every action that does not add value to the mobilization effort can be seen as detracting from the effectiveness of the mobilization.

Regulatory - One measure of the adequacy of the acquisition regulations during an emergency is how well they capture the spirit and intent of law, without imposing additional unnecessary burdens, while providing users with maximum flexibility at reasonable approval levels. By this measure, the regulations appeared to be adequate during ODS. In other words, the regulations provided the means to fully exploit most

mobilization enhancing alternatives available under law. Whether the approval levels for exploitation is at the appropriate level is a matter of subjective judgement, but DoD regulators have reviewed approval levels for appropriateness on several occasions⁴². Despite the general adequacy of the acquisition regulations, short-comings were highlighted pertaining to some actions⁴³.

Another measure of the adequacy of acquisition regulations during mobilization is the ease with which they can be used under combat conditions. A complaint registered by several ODS participants⁴⁴ was that the body of acquisition regulations available for or pertinent to a mobilization was not available. That is, contracting officers, who were trained and conditioned to operate in a peacetime environment, had to relearn how to contract in a mobilization environment. This appeared to be more of a problem in in-theater contracting offices and smaller CONUS contracting offices without direct access to large policy staffs.

Another concern expressed by in-theater contracting personnel was that the authority to purchase locally, in lieu of from designated centralized managers, was not clear⁴⁵.

The regulatory lessons learned from ODS can be summarized as follows: In total, the regulations provided most of the tools necessary to fully exploit the laws. However, everyone did not have equal knowledge of, or access to, all the tools.

Policy - In the defense acquisition process, policy comes in two

forms -- fixed and variable. Fixed policy is expressed in the regulations, directives, instructions, and manuals issued by DoD. Variable policy is contained within the parameters of the fixed policy. Variable policy is that which is deferred to individuals throughout the system to set, in accordance with existing circumstances. Waivers and exemptions executed during a mobilization are examples of variable policy. Since different individuals will view the same situation differently, the extent to which peacetime policy will be waived in favor of mobilization policy will vary. The adequacy of fixed policy during ODS is essentially answered in the discussion of "Regulatory" above. That is, the regulations are the fixed policy.

There was some criticism during ODS that certain variable policy makers did not make the appropriate policy decisions for a mobilization environment⁴⁶. It would be inappropriate to conclude, from the information available, that some officials made the "wrong" policy choices during ODS. As a lesson learned however, it is safe to conclude that policy choices will not be consistently by individuals, even when operating in similar environments.

Framework for Recommendations

Before addressing specific recommendations to improve our ability to contract during the next mobilization, it is useful to establish the framework within which those recommendations should be considered.

The mission is defense. Even though the primary mission of

DoD is sacrificed during peacetime by using the DoD acquisition process to achieve many goals, supporting the troops must be the overriding concern in all acquisition decisions and trade-offs during a mobilization.

Graduated Mobilization Response is the most viable approach to any future crisis. It is unlikely that our first effort to respond to any future crisis will be a declaration of war or national emergency. Under the GMR scenario, we cannot depend on sweeping contracting authority to save the day. Authority to support mobilization needs via contracting must be available as a matter of course. Authority to deviate from peacetime acquisition laws and procedures must be readily available at operationally effective levels.

Mobilization signals the will of the Nation to divert resources and activities to meet a perceived crisis. The signal should be clear not only to the international community and the general public, but to individuals supporting the mobilization at every level within the Government. The contracting officer should not be put through extraordinary administrative hurdles to provide support to troops in combat. (What kind of signal is the contracting officer getting if efforts to support mobilization at the expense of a social program must be "justified?")

Contracting is an element of logistics. Logistics is the means of war⁴⁷. Good logistics support provides field commanders with opportunities to exploit battlefield situations. During ODS, field

commanders had the benefit of approximately six months of logistics preparation to support a brief, but intense, ground war. CONUS, regional, and in-theater contracting support was a critical element of that logistics support. Lawmakers and policy makers must realize that the efficiency and effectiveness of contracting offices during a mobilization is reflected on the battlefield. Making the "right" trade-off between social goals and mobilization support is easier if the relationship between the contracting office and the battlefield is recognized.

Flexibility and timeliness⁴⁸ are critical to the success of future contracting in support of mobilization. Flexibility is more important than at any time in the past for several reasons. We cannot predict when, where, or who we will be fighting. The degree of host nation or allied support will vary from conflict to conflict. We will need flexibility to contract from anywhere in the world, in virtually any market open to us during a conflict. From this perspective, we should not create legislative and regulatory conditions that will limit our ability to optimize CONUS, regional, and in-theater contracting platforms⁴⁹. Also, as the base of contractors doing business with DoD during peacetime shrinks, we are likely to need the support of non-Defense contractors during a mobilization. More often than in the past, DoD may find itself in a position of having to accept someone else's rules of engagement in the contracting arena.

Timeliness at the outset of a mobilization, requires acquisition professionals to be able to convert to a mobilization mode on short notice. Timeliness during the mobilization requires quick reaction to

the changing circumstances of the conflict and the ability to contract for supplies and services expeditiously. Administrative requirements that add no value to the mobilization effort must be recognized as detracting from the overall timeliness of contracting personnel.

Recommendations

Legislative

(1) Every law pertaining to the DoD acquisition process, should include a mechanism, to allow for prioritization of national defense needs during a mobilization. The mechanisms should be available at an operationally effective level, be available for classes of items or actions, and involve a minimum of administrative effort.

(2) Simplified procedures should be available to mitigate the cumulative impact of legislation designed to achieve social goals during peacetime. The most obvious answer to much of the cumulative impact is to increase the threshold for application of all socioeconomic legislation to the simplified small purchase threshold⁵⁰. A force multiplier of this action would be to increase the threshold during mobilizations. Not just for overseas contracting as the law currently provides, but for all contracting offices. During limited mobilization efforts the authority to use simplified procedures may be appropriate only for actions in support of the mobilization. As the mobilization effort expands, and contracting resources are strained, consideration should be given to applying the simplified criteria to all contracts.

Regulatory - Regulators should take a page from Hippocrates and vow to "at least do no harm." That is, regulations should maximize the flexibility available under the law, so that users can apply their knowledge, skills and abilities to meet the widest array of contingencies. Regulations that provide flexibility and decision making authority to the lowest practical levels is consistent with the goal of having a professional acquisition workforce⁵¹.

Regulators should also take action to fix the individual problems identified during ODS, e.g., the local purchase authority question and the Balance of Payments Program issue.

A compendium of acquisition regulations applicable during a mobilization would be useful to acquisition personnel as they transition from peacetime contracting to mobilization contracting. However, the FAR is not the appropriate place for such a compendium⁵². In spite of its size, the FAR is rarely redundant. The basic rules of contracting are spelled out once. Thereafter, coverage pertaining to a particular type of contracting (services, construction, research and development, etc.) discusses only elements of contracting unique to that type. In other words, Part 37, Service Contracting, is not a handbook on how to enter into a service contract. A contracting officer must be knowledgeable in many other aspects of the FAR to enter into a service contract.

Exceptions that may be useful under a mobilization may also be useful

under other circumstances and are included in the FAR along with the basic rule being addressed. By trying to list all of the tools that may be available during a mobilization, the contracting officer may lose sight of opportunities available elsewhere in the FAR.

There are also practical problems with using the FAR to assimilate contingency contracting provisions. The most notable problem is that under the GMR concept, there will be no one set of conditions or authorities appropriate for every mobilization. Another problem is that it may be difficult to get all players (including non-DoD FAR users) to agree to what should be included under contingency contracting.

A more practical answer to the problem of having access to the full range of opportunities available during a mobilization would be for each level of authority in the contracting chain (Chief of the Contracting Office, Head of the Contracting Activity, Agency Head, etc.) to maintain lists of what legislative and regulatory alternatives are available during a mobilization that require action at that level. Individual decisions to take alternative actions will depend on the circumstances of the mobilization.

Policy

There is no way to exercise absolute control over individuals entrusted with making policy decisions during a mobilization. The responsible acquisition decision makers should accept that senior officials have decided to reprioritize the concerns addressed by

various socioeconomic and oversight laws. Within those parameters, some difficult decisions and trade-offs will have to be made. One way to influence behavior under such circumstances, is to minimize the degree of difficulty and risk associated with any choice available to the contracting officer. Fear of not meeting a socioeconomic goals or of being criticized for abuse of a waiver authority should never be on a contracting officer's mind once the shooting starts. Acquisition officials at all levels must understand the implications and parameters of mobilization, so that the DoD acquisition community can approach a mobilization with some degree of predictability and cohesiveness.

Conclusion

Acquisition laws and regulations did not create any problems during ODS that could not be resolved within the generous and forgiving circumstances of that crisis. There is reason to believe that the same laws and regulations may be an impediment in future mobilizations, under different circumstances. The potential problems can be avoided with little cost and minor harm to the peacetime benefactors of socioeconomic laws. A little reflection on why DoD is in business, and what our priorities should be when we send troops into battle should go a long way toward helping us to refocus during a mobilization. Of the 50 potential ways to screw up the perfect mobilization, the failure to award a timely contract may be the least excusable.

NOTES

¹ "Contract" as used herein includes all variations of legally binding agreements as defined in Subpart 2.1 of the Federal Acquisition (FAR).

² Graduated Mobilization Response (GMR), as explained in the First Draft of DoD Joint Pub 4-05 dated 22 February 1993, p.I-1, "...provides the framework for achieving the desired mobilization capability and is a model for coordinating resources and plans for military and civilian mobilization."

³ Clem, Harold C., "Mobilization Preparedness", National Defense University, 1983, contains one such listing of mobilization classes of actions.

⁴ Draft DoD Joint Pub 4-05, pp. I-6 and I-7 describes the three stages of GMR as "Planning and Preparation" (Stage III), "Crisis Management" (Stage II), and "National Emergency" (Stage I). The contracting authorities and procedures useful in Stage III are substantially different than those necessary to react once a crisis is identified. Once a "National Emergency" or "War" is declared (a declaration is not mandatory for Stage I), many of the contracting problems are answered under the umbrella of broader authorities. Therefore, from a contracting perspective, it makes sense to focus on Stage II and the pre-declaration" portion of Stage I.

⁵ Even during ODS, when we were argueably better prepared to mobilize than for any emergency in the past, the six months prior to the beginning of the ground war were necessary to allow time to work out some of the bugs associated with being prepared to fight in a forrest and not in a desert (e.g., uniforms, sandbags, boots, tank paint all needed to be "fixed" prior to engagement).

⁶ The scene in the referenced movie pertained to the planning and execution of the perfect murder.

⁷ Culver, C.M., "Federal Government Procurement - An Uncharted Course Through Turbulent Waters," National Contract Management Association, 1984, p.1.

⁸ Ibid. pp. 2-6 gives examples such as the Civil Sundry Appropriations Act of 1861 and the banning of Cost Plus a Percentage of Cost contracts after WWI.

⁹ Ibid. pp. 2-6 cites several laws related to formal advertising and contract auditing, as well as laws pertaining to the use of convict labor.

¹⁰ Ibid. p. 10 cites the Multiple Awards Act and the Speed Up Act for contracting and production purposes, as well as the Selective Service Act for manpower.

¹¹ Independent laws like the Buy American Act and the Davis-Bacon Act were not incorporated into the ASPA.

¹² Culver p. 15.

¹³ Danzig, Richard, "A Review of the Adequacy of Principal Statutory Authorities Affecting DoD Surge and Mobilization Capacity," September 1983, p.3.

¹⁴ Ibid. p. 34.

¹⁵ Ibid. p.35.

¹⁶ "Acquisition Policies During Mobilization," DoD Logistics Systems Analysis Office (LSAO), 1987. Prepared at the request of the Deputy Assistant Secretaries of Defense for Logistics and Procurement.

¹⁷ The author provided Defense Logistics Agency (DLA) support for the study in 1987. The author called OSD during ODS and was advised that the recommendations had made little progress since 1987.

¹⁸ For example, statutory relief was granted to some extent for Justification and Authority for Purchases from Foreign Governments. Also, the small purchase threshold for contracts outside the United States in support of contingency operations was authorized during ODS, and is now permanent law.

¹⁹ For example, 10 U.S.C. 2326 which restricts the use of Undefined Contractual Actions.

²⁰ Killen, Kathleen E., Captain, USAF, and Wilson, Gavin P., Captain, USAF, "An Analysis of Contracting Actions by United States Based Department of Defense Organizations to Support Operations Desert Shield and Desert Storm," Thesis, Air Force Institute of Technology, 1992. And, author's experience working acquisition issues for DLA during and after ODS.

21 Ibid. pp. 69-71, and experience of author.

22 The author was the DLA representative. The Process Action Team that met was the same group that met yearly to develop legislative proposals for consideration by the Director, Defense Procurement.

23 Ibid.

24 "DoD Pressing for Waiver of Acquisition Laws to Meet Urgent War Needs," Federal Contracts Report, 28 Jan 1991, Vol. 55, p.85.

25 A formal legislative package must represent the coordinated position of the Executive Branch and be submitted through the Office of Management and Budget. Fortunately, the war ended before the failure of this effort caused significant problems.

26 Section 1121, Public Law 101-510.

27 Byther, Doug, LTC, USA, "Federal Acquisition Regulation, Friend or Foe?" Army Logistician, Nov.-Dec. 1991, p.35.

28 Killen and Byther.

29 Federal Contracts Report, p.85, and author's experience.

3030 Sec. 8(b)(7)(A) of the Act gives the SBA the authority to overturn a contracting officer's determination that a small business is not responsible to perform a particular contract. The referral and appeal process can take up to 60 days.

31 Section 8(d) of the Act applies to most contracts over \$500,000.

32 10 U.S.C. 2326 requires definitization within 180 days of the date of the contracting action. The period for definitization can be extended to 180 days after receipt of a qualifying proposal, but no longer. Expenditures are limited to 50 percent of the total "not-to-exceed" price (increases to 75 percent after receipt of qualifying proposal).

33 Public Law 91-379, as implemented in Part 30 of the FAR allows for many exemptions to the CAS requirement. Still, there are situations where no exemption is authorized.

34 When several contract awards were threatened by CoC delays,

the SBA advised personnel to prioritize ODS CoCs. (Author's personal experience.) This type of cooperation can help to minimize the delays inherent in the CoC process, but does not address the larger question of why a contracting officer's determination of responsibility in support of a war effort is subject to being overturned by an agency interested in protecting small businesses.

35 The Competition in Contracting Act, 10 U.S.C. 2304(c)(1)-(7) includes exceptions for "Unusual and compelling urgency," "Industrial mobilization," and, "Public interest".

36 Buy American Act (41 U.S.C. 10) provides five exceptions including one for products acquired for use overseas, which throws many wartime requirements into the nonstatutory realm of the Balance of Payments Program (which also has a list of exceptions).

37 During the OSD round-up of proposed legislative relief for ODS, several activities (including the Defense Personnel Support Center, a DLA field activity) highlighted the cumulative burden on resources created by requirements such as the processing of Justification and Authority documents.

38 41 U.S.C. 35-45.

39 29 U.S.C. 793.

40 38 U.S.C. 2012.

41 5 U.S.C. 552.

42 The most recent comprehensive review of threshold and approval levels was being conducted during ODS as part of the Defense Management Review of the DFARS.

43 For example, Killen and Byther pointed out the need for more clear-cut authority to exempt overseas acquisitions during a contingency from the Balance of Payment Program, FAR 25.302.

44 Killen and Byther.

45 Byther.

46 Killen.

47 Eccles, Henry E., "Logistics in the National Defense," The Stackpole Company, 1959, p. 46.

48 Flexibility and timeliness are two of the four mobilization tenets set forth in the Draft DoD Joint Pub 4-05. The other tenets, "objective" and "unity of effort" are not as critical to the contracting aspect of mobilization.

49 There was evidence during ODS (Byther and Killen) that some contracts which would have otherwise been awarded in CONUS, were awarded in theater to take advantage of the \$100,000 small purchase threshold.

50 Currently \$25,000 as set forth in the OFPP Act. The threshold is to be adjusted for inflation every five years beginning in 1995.

51 A goal of the Defense Acquisition Workforce Improvement Act, 10 U.S.C. 1746.

52 Killen and Byther suggested a new FAR Part for contingency contracting.